Other carrier practices do not involve generally available "off-the-shelf" offerings but impact efforts by resale carriers to negotiate service arrangements with network providers or relate to the network provider's performance following commencement of service to the resale carrier. Obviously, a critical component of a successful resale operation is the ability to obtain service at wholesale rates predicated upon commitments to take substantial volumes of usage for extended terms. Resale carriers "live in the margin" between what they must pay their network providers for service and what they can in turn charge their customers for service. This margin must support the entirety of their operations, including, among other things, marketing and such back-office functions, as customer service, billing and collections. It must also provide them with the ability to price their services below the rate charged at retail by their network provider and other facilities-based carriers because while quality customer service and service diversity may be the only ways to retain existing customers over the long term, price breaks are necessary to persuade prospective customers to try a less well known provider.

The Congress recognized the importance of maintaining a differential between wholesale and retail rates when it not only directed ILECs to offer "for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers", but mandated that that differential must reflect all costs avoided by the ILEC in providing a wholesale, rather than a retail, service.[49] The Commission echoed this belief in implementing the 1996 Act's resale requirements:

> In light of the strategic importance of resale developments of competition, we conclude that it is especially important to promulgate national rules for use by state commissions in setting wholesale rates.

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[49] 47 U.S.C. §§ 251(c)(4) and 252(d)(3).

TRA will not ask here for a Commission-mandated wholesale/retail differential. Rather, TRA seeks an end to the discriminatory rate treatment experienced by resale carriers. A resale carrier cannot currently obtain from any interexchange network provider rates equal to those available to large corporate users with comparable traffic volumes. Worse yet, resale carriers are often required to commit to many millions of dollars of usage to obtain rates available to traditional commercial users with usage only in the thousands of dollars. This blatant and ongoing discriminatory treatment undermines resale in general and has a particularly adverse impact on small carriers whose small business customers are offered rates by network providers comparable to those they themselves must pay to the same network providers even though the small business customers' usage is a fraction of the resale carriers' commitments.[50]

Also of critical importance to resale providers is operational support. As noted earlier, a network provider can devastate a resale carrier customer's business by not provisioning its service orders in a timely manner or refusing other operational support, and/or by providing it with untimely, incomplete or inaccurate billing tapes. As the Commission recognized, "operations support systems functions are essential to the ability of competitors to provide services in a fully competitive local service market."[51] Indeed, the Commission concluded that "competitors' ability to provide service successfully would be significantly impaired if they did not have access to incumbent LECs' operations support systems functions."[52] The Commission

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[50] The rates referred to above are generally only offered to small business customers who have been approached by resale carriers. Otherwise, network providers tend to secure their largest margins from small commercial accounts.

[51] Local Competition Order, CC Docket No. 96-98, at ¶ 522.

[52] Id.

accordingly ordered ILECs to provide "nondiscriminatory access to their operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself."[53]

Access to operations support systems functions is no less critical in the interexchange, wireless and other telecommunications markets. Resale carriers have not generally enjoyed nondiscriminatory access to these functions. TRA therefore urges the Commission to extend its directive that these functions be provided on an equitable, nondiscriminatory basis to telecommunications markets in addition to the local market, thereby facilitating the provision of service by small resale carriers.

In order to maintain the integrity of its policy that all common carrier services be available for resale by even the smallest resale providers, TRA urges the Commission to declare unlawful tariff provisions and carrier practices which as a practical matter render service offerings unavailable for resale or unresellable, or otherwise hinder the ability of resale carriers to fully serve their small business and residential customers.

3. The Commission Should Adopt Rules and Policies Which Will Ensure the Effectiveness of The Carrier Confidential Information Safeguards Embodied In Section 222(a) & (b) Of The 1996 Act

In its Comments and Reply Comments filed in CC Docket No. 96-115,[54] TRA urged the Commission to adopt implementing rules and policies that would ensure the

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[53] Local Competition Order, CC Docket No. 96-98, at ¶ 523.

[54] Implementation of the Telecommunications Act of 1996: Carriers' Use of Customer Proprietary Network and Other Customer Information, CC Docket No. 96-115, FCC 96-221 (released May 17, 1996).

effectiveness of the safeguards embodied in Sections 222 (a) & (b) of the 1996 Act.[55] As TRA explained, Sections 222(a) and 222(b) contain the prohibition long sought by resale carriers against abuse by network providers of the competitively-sensitive data resale carriers are compelled to disclose in order to obtain network services. Section 222(a) imposes on all telecommunications carriers the duty to protect the confidentiality of proprietary information of, and relating to, not only other telecommunications carriers, but telecommunications carriers reselling telecommunications services provided by the telecommunications carrier.[56] Section 222(b) enhances this obligation by prohibiting the use by a telecommunications carrier in its own marketing efforts of proprietary information it receives or obtains from another carrier for purposes of providing a telecommunications service; indeed, Section 222(b) mandates that such proprietary information may be used only for the purpose of providing telecommunications service to that other carrier.[57] In other words, Sections 222(a) and 222(b) together bar a network provider from using for its own competitive advantage the confidential information disclosed to it by a resale carrier customer, essentially reaffirming and codifying the age old common law common carrier obligation.

In order to obtain network services, a resale carrier must disclose to a generally far larger, better established competitor its most valuable competitive information -- *i.e.,* its subscriber list. While most competitors jealously guard the identity of their customers, treating such information as trade secrets, a resale carrier must not only voluntarily disclose to its network

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[55] Comments and Reply Comments of the Telecommunications Resellers Association in CC Docket No. 96-115, filed on June 11, 1996 and June 26, 1996, respectively.

[56] 47 U.S.C. § 222(a).

[57] 47 U.S.C. § 222(b).

provider the names, addresses, service locations and contact points of all its subscribers, but must position that same underlying carrier so that it can readily ascertain the precise telecommunications requirements of the resale carrier's subscribers. And given that a network provider knows the exact cost of service it is charging its resale carrier customers, it can generally determine the rates any given resale carrier customer is charging its own subscribers. In other words, a resale carrier must provide its underlying carrier with all the information that that entity requires to very effectively raid the resale carrier's subscriber base.[58]

While the 1996 Act safeguards a resale carrier's confidential information from abuse by its underlying carriers, a statutory prohibition is meaningless unless it is enforceable and enforced. TRA urges the Commission here, as it did in CC Docket No. 96-115, to put "teeth" into Sections 222(a) and 222(b), thereby realizing the Congressional intent that network providers should not be allowed to exploit their carrier/customer relationship with their resale carrier customers by abusing confidential data disclosed in furtherance of that relationship to appropriate the resale carrier customer's subscribers. To this end, TRA offered, and here offers again, the following five recommendations to ensure that safeguards embodied in Sections 222(a) and 222(b) are enforceable and enforced:

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[58] Unfortunately, this is not a theoretical concern for resale carriers. In responding to a survey distributed by TRA to its resale carrier members in 1994, a large percentage of respondents reported that their underlying carriers had solicited their subscribers using confidential information they had disclosed in order to obtain network services. Nearly 90 percent of those respondents using AT&T as their network provider reported such abuses. More than 50 percent of those respondents identifying Sprint as their underlying carrier and roughly a third of those respondents identifying WorldCom, Inc. d/b/a LDDS/WorldCom ("WorldCom") as their network provider registered similar complaints. Among AT&T resale carrier customers, over 60 percent characterized instances of such abuse of competitively-sensitive information as "very frequent" or "frequent" and nearly 90 percent identified the problem as "very serious" or "serious." And as more and more carriers enter the local exchange and wireless markets through resale and must deal with monopoly and duopoly providers, the problem will only get worse and worse.

- The Commission should issue a strong, unequivocal and unambiguous policy statement declaring that it is unlawful for network providers to use information disclosed to them by their resale carrier customers for any purpose other than to provide the telecommunications and other (*e.g.,* billing) services for which the resale carrier customers have contracted.

- The Commission should impose on network providers the duty to safeguard against unauthorized disclosure and abuse by their marketing personnel of the competitively-sensitive data of their resale carrier customers. Certain threshold requirements are appropriate in this respect. First, network providers should be required to deny all marketing personnel access to the confidential data of their resale carrier customers. Second, a corporate officer of each network provider should be required to formally certify on a periodic basis that the proprietary data of resale carriers cannot be accessed by marketing personnel. Third, network providers should be required to detail in publicly available filings with the Commission the steps they have taken to render the confidential information of resale carriers inaccessible by marketing personnel.

- The Commission should impose upon network providers a "strict liability" standard for breaches of their obligations under Sections 222(a) and 222(b). It is the network providers that will be making the determinations as to the adequacy of their database safeguards and realizing the benefits of any cost or administrative savings from use of lesser measures. It is also the network providers that will realize the benefits from illicit marketing successes by their marketing personnel. It is, therefore, the network providers that should bear the liability burden for any failure of their systems.

- The Commission should make clear that network providers are not permitted to do indirectly that which Sections 222(a) and 222(b) prohibit them from doing directly. Specifically, the Commission should declare unlawful the "laundering" of the confidential data of resale carriers through other carriers, particularly LECs.

- The Commission should rigorously enforce the Section 202(a) and 202(b) mandates by imposing heavy monetary sanctions on network providers for all violations of those requirements.

In order to ensure that small carriers' competitive viability is not undermined by abuse of confidential data by their underlying network providers, TRA strongly urges the Commission to implement the safeguards embodied in Section 222(a) & (b) in a manner that will effectively prevent such anticompetitive conduct.

4. The Commission Should Adopt A Streamlined, Highly-Expedited Complaint Process For Airing And Resolving Carrier-To-Carrier Disputes Brought By Resale Carriers Against Their Network Providers

In PP Docket No. 96-17, the Commission sought suggestions as to means by which, the Commission could streamline or otherwise improve its procedures, processes, rules and regulations.[59] In response to that invitation, TRA recommended that the Common Carrier Bureau ("CCB") establish a discrete, streamlined, highly-expedited complaint process for airing and resolving carrier-to-carrier disputes brought by resale carriers against their underlying network providers.[60] As TRA explained, the Commission's formal complaint processes suffer from the same problems that plague virtually all adjudicatory mechanisms -- *i.e.,* they are cumbersome and costly and as a result, favor those entities which are possessed of greater resources and which coincidentally stand to benefit from maintenance of the status quo. Because complaint resolution often takes years and can require substantial investments in legal and other services, the process tends to work to the advantage of those parties who are not only able to spend considerable amounts on lawyers and experts, but who are able to act unilaterally to disadvantage others. Put differently, a party in a position to deny something of value, or to act in a manner injurious, to another party and to defer through legal maneuvering regulatory intervention addressing such conduct will benefit from a cumbersome and costly complaint process while the party so denied or injured will suffer.[61]

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[59] Improving Commission Processes, PP Docket No. 96-17, FCC 96-50 (released February 14, 1996).

[60] Comments of the Telecommunications Resellers Association in PP Docket No. 96-17, filed March 15, 1996.

[61] It is important to stress here that the concerns expressed by TRA above are not theoretical. Resale carriers have filed dozens of formal complaints with the Commission against their network providers seeking redress therein for a host of wrongs. The overwhelming majority of those complaints are either still pending or have been settled on terms unfavorable to resale carrier complainants who simply could

In disputes between resale carriers and their underlying network providers, the network provider is invariably better positioned to take advantage of and to derive benefit from a costly, cumbersome dispute resolution process. Major facilities-based carriers certainly have far more extensive financial and legal resources to dedicate to the complaint process than their much smaller resale carrier customers. And the facilities-based carrier, as the provider of services, is obviously the party in the position to either deny service to, or to provide service in such a way as to injure, the resale carrier and to benefit from any delay in resolution of the resale carrier's complaint seeking relief from such actions.[62]

Further compounding the problems arising from delayed resolution of resale carrier complaints against network providers is the speed and frequency of change in the telecommunications industry. The value of price points and service offerings diminishes rapidly

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no longer afford to prosecute their complaints in the face of the seemingly endless delays. A case in point is a complaint brought in June 1993 by Public Services Enterprises of Pennsylvania, Inc. ("PSE") against AT&T Corp. ("AT&T") alleging that AT&T had wrongfully denied PSE access to Virtual Telecommunications Network Services Option 24. Although PSE ultimately prevailed, the decision granting its complaint did not issue until May 1995. And even then, the Commission merely directed the parties to "engage in good faith negotiations aimed at resolving any remaining issues pertaining to PSE's request for service and any damages liability," noting that "PSE will, of course, have the opportunity to file a supplemental complaint to pursue any available remedies should the parties negotiations prove unsuccessful." Public Service Enterprises of Pennsylvania, Inc. v. AT&T Corp., 10 FCC Rcd. 8390, ¶ 30 (1995), *remanded* Civ. No. 95-1339 (D.C.Cir. June 21, 1996).

[62] By way of example, if a network provider were to discriminate against a resale carrier by denying it access to preferred price points or superior service capabilities, it is the resale carrier that would be disadvantaged competitively during any extended consideration of a complaint addressing such denial, while the network provider, having determined that it was in its interest to discriminate against the resale carrier, would benefit from such delay. Likewise, if a network provider were intentionally slowing the provisioning of service orders submitted by a resale carrier or abusing the resale carrier's confidential carrier information, the network provider would continue to benefit from its conscious actions during any delay in resolving complaints targeting such activities, while the harm to the resale carrier would continue to mount. Indeed, if the delay in obtaining relief were extensive enough, the resale carrier could be driven into bankruptcy or forced to settle on unattractive terms to preserve its business, leaving the network provider as the undeserving victor.

with the passage of time following their initial availability. The market is constantly evolving and moving in new and different directions. What is useful and attractive today may well be of little value tomorrow. Hence, a determination made two years after the fact that a resale carrier was wrongfully denied a price point or service offering will provide little more than a pyrrhic victory for the resale carrier. There is a strong likelihood that no such delayed directive from the Commission would ever be implemented because the price point or service offering that was the subject of the complaint would be useless to the resale carrier at that time.

To address the unique adjudicatory problems posed by the dual nature of the relationship between resale carriers and their underlying network providers, TRA recommended in PP Docket No. 96-17 that the Commission establish a discrete, streamlined, highly-expedited process for resolving carrier-to-carrier disputes brought by resale carriers against their underlying network providers. This process would be ancillary to, and utilized in lieu of, the Commission's traditional formal complaint processes. Thematically, the keys are speed, efficiency and certainty. If these three elements can be achieved, the Commission's formal complaint process should provide a viable forum for resolution of resale carrier/underlying network provider disputes.

Several key elements of this dispute resolution process recommended by TRA are as follows:

- Disputes brought by resale carriers against their underlying network providers must be completed within a confined period of time -- *e.g.,* 90 days.

- The process should not be voluntary and the results thereof should be binding. The sole differences between the "resale carrier track" and the Commission's traditional formal complaint processes should be the speed with which disputes would be resolved, as well as the procedural adjustments necessary to facilitate such expedited action.

- "Resale carrier track" complaints should be heard by an administrative law judge or other like hearing officer who has been afforded substantial discretion in the manner in which the complaint proceeding would be conducted. Certain procedural safeguards should be mandatory, but beyond this threshold, the hearing officer should be empowered to determine the best way to move the case forward. Thus, parties should have the right to engage in discovery, including document production and depositions, but beyond a certain guaranteed amount, the hearing officer should be authorized to set appropriate time and volume limits. The parties should also have the right to subpoena and cross-examine the other party's witnesses, but the hearing officer should be empowered to establish limits on the number of witnesses and the time of examination.

- The scope of the proceedings conducted under the "resale carrier track" should not be limited other than by the threshold requirement that the dispute involve a resale carrier and its underlying network provider and be directly related to that relationship. The hearing officer should be permitted to award equitable relief, including orders enjoining conduct or requiring specific performance, as well as monetary damages. In particularly complex cases, it might be advisable to provide for bifurcated consideration of liability and damage claims, with the latter consideration perhaps extending beyond the normal 90 or 120 day deadline. The Commission may even wish to consider mechanisms to prompt settlement of damages issues following the determination of liability, such as directing the hearing officer to select among the parties' respective "last best offers."

- Subject to confidentiality requirements, the transcripts and records of the "resale carrier track" complaint proceedings, as well as the hearing officer's interim rulings and ultimate decision therein, should be made available for public inspection. While findings made in a one complaint proceeding should not necessarily be determinative of the outcome of another complaint proceeding, public disclosure of transcripts and decisions should serve to reduce the number of complaints as appropriate standards of conduct become known and are widely followed.

In order to provide small carriers with a workable mechanism for resolving disputes with their underlying network providers, TRA urges the Commission to establish a discrete, streamlined, highly expedited "resale carrier track" complaint process which will provide relief sufficiently quickly to preclude network providers from irreparably damaging -- or destroying -- the resale carrier's livelihood through mere delaying tactics.

5. The Commission Should Declare Unlawful, And Bar The Filing Of, Tariff Revisions Which Modify, Without "Grandfathering," Existing Long-Term Service Arrangements

Because they make very substantial volume, as well as term, commitments to their underlying network providers, TRA's resale carrier members are vulnerable to unilateral changes made by those network providers in the rates they pay for, and the terms and conditions pursuant to which they take, network services. Indeed, they are more vulnerable to such unilateral action than traditional large corporate users not only because they are actively competing with those network providers, but because they may have made commitments to their customers to deliver service at certain rates and pursuant to the terms and conditions to which they agreed with their network providers. To remedy this problem, TRA proposed in CC Docket No. 96-61 several means by which carriers could be prevented from utilizing tariff filings to unilaterally alter long-term service arrangements to the detriment of existing customers.[63] TRA reiterates those proposals here.

Initially, TRA recommended that the Commission strengthen the "substantial cause" test[64] to prohibit unilateral changes in long-term service arrangements in all but the most extreme circumstances and, in those extreme circumstances, to afford customers of long-term service arrangements which have been unilaterally altered a "fresh-look" opportunity to terminate the arrangement without liability. Consistent with this recommendation, TRA also urged the

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[63] Comments and Reply Comments of the Telecommunications Resellers Association in CC Docket No. 96-61, filed on April 25, 1996 and May 24, 1996, respectively.

[64] RCA American Communications, Inc., 84 F.C.C.2d 353 (1980); RCA American Communications, Inc., 86 F.C.C.2d 1197 (1981); AT&T Communications -- Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 6777 (Com. Car. Bur. 1990).

Commission to apply the Mobile-Sierra doctrine[65] to all carrier-to-carrier service arrangements irrespective of the form or context in which such arrangements are embodied and in so doing to prohibit unilateral modification of carrier-to-carrier arrangements, including arrangements between resale carriers and their network providers, through tariff revisions.

Subsequently, and to address concerns voiced by large corporate users, TRA recommended that the Commission declare unjust and unreasonable and hence, unlawful and unenforceable any tariff revision which effects a unilateral modification to an existing long-term service arrangement. Under this expanded approach, carriers would be permitted to modify their extended-term service offerings only so long as they "grandfathered" all existing customers, including those that had ordered, but not yet received, service, for the full term of their current service arrangements. Carriers would likewise be allowed to modify rates if a service arrangement were structured so that the customer was only guaranteed a set discount off rates that it was aware could be increased from time to time, but the carrier would not be allowed to reserve to itself the right to make other changes in terms or conditions of service. And of course, a carrier would be permitted to alter the terms of an existing long-term service arrangement with the acquiescence of all current customers thereto. In other words, carriers would be required to deal with customers as suppliers do in the normal commercial world.

This is not to suggest that a carrier could not petition the Commission for a waiver of this requirement, but it could not effect the desired changes unless and until the Commission expressly authorized it to do so. The standard for granting any such waivers should be exceedingly high. Commercial impracticability, frustration of purpose and impossibility of

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[65] United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 339 (1956); Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

performance would all appear to be appropriate tests,[66] as would a showing of no adverse impact on existing customers. And even if such a waiver were granted on commercial impossibility grounds, the carrier should be required to afford its existing customers a "fresh-look" opportunity to terminate their service arrangements without liability.

As the U.S. Supreme Court has noted, "the filed rate doctrine . . . contains an important caveat;" a revised rate, term or condition is enforceable only if it is not unjust or unreasonable and hence unlawful.[67] The Commission can reasonably determine that as a general rule, any tariff revision that unilaterally alters the terms and conditions of an existing long-term service arrangement is unjust and unreasonable and hence unlawful. Indeed, if the Commission so chose, it could do so simply by extending the reach of the Mobile-Sierra doctrine to cover all contract-like carrier service arrangements. As the U.S. Court of Appeals for the District of Columbia Circuit has recognized, the Mobile-Sierra doctrine "restricts federal agencies from permitting regulatees to unilaterally abrogate their private contracts by filing tariffs altering the terms of those contracts."[68] In order to protect the integrity of small resale carriers' long-term service arrangements with their underlying network providers, TRA urges the Commission to declare unlawful, and bar the filing by network providers of, unilateral tariff revisions which modify, without "grandfathering," existing long-term service arrangements.

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[66] *See* 18 S. Williston & W. Jaeger, Williston on Contracts (3d ed. 1978) at 1, et seq.; Restatement (Second) of Contracts (1979) §§ 261, et seq.

[67] Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 at 130 (*citing* Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1915); Keough v. Chicago & Northwestern R. Co., 260 U.S. 156, 163 (1922)).

[68] MCI Telecommunications Corp. v. FCC, 665 F.2d 1300, 1302 (D.C. Cir. 1981).

III.

CONCLUSION

In fulfilling its mandate under Section 257 of the 1996 Act to "identif[y] and eliminat[e] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services", TRA urges the Commission, by reason of the foregoing, to take the actions outlined in these Comments. TRA submits that the recommended actions will not only facilitate further entry into, but will enhance the prospects for long-term survival and success in, the telecommunications industry by small resale carriers.

Respectfully submitted,

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